

**BEFORE THE
SURFACE TRANSPORTATION BOARD,**

224874

STB Finance Docket No. 35219

**PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR DECLARATORY ORDER**

**COMMENTS OF
PPG INDUSTRIES, INC.
IN OPPOSITION TO THE PETITION**

Karyn A. Booth
THOMPSON HINE LLP
1920 N Street, N.W.
Washington, DC 20036
(202) 263-4108
karyn.booth@thompsonhine.com

Counsel for PPG Industries, Inc.

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PPG Industries, Inc. ("PPG") hereby submits its comments in opposition to the Union Pacific Railroad's ("UP") Petition for Declaratory Order. In its Petition, the UP has asked the Surface Transportation Board ("STB" or "Board") to clarify whether UP can renounce its common carrier obligation with respect to the transport of chlorine, a toxic inhalation hazard ("TIH"), when alternative sources of the commodity exist closer to the destination. UP's Petition was filed in connection with an on-going dispute between the railroad and a single customer, in which UP has refused to provide that customer with tariff rates for the movement of chlorine, based on alleged safety and public interest concerns.

The Board should deny UP's Petition because neither the law nor the facts set forth in the Petition justify UP's abdication of its common carrier obligation.¹ More troubling, is the

¹ PPG supports the Reply Comments submitted by the Chlorine Institute and the Joint Comments of the American Chemistry Council, American Forest and Paper Association, Edison Electric Institute, The Fertilizer Institute, The National Industrial Transportation League, and the Paper and Forest Industry Transportation Committee, and incorporates by reference the legal arguments set forth in those submissions. PPG will not address directly the facts

railroad's disregard for the broad ramifications and adverse impacts that the requested relief would have on the market for chlorine, and its incorrect assumption that one supplier of chlorine can be substituted readily for another in all cases. UP's Petition also improperly seeks to extend the Board's jurisdiction to address directly rail safety and security matters which are vested in other federal agencies. Finally, PPG is concerned that if the Board sanctions the UP's refusal to quote tariff rates, such conduct will undoubtedly spread to other railroads and commodities, thereby gutting the common carrier obligation which has served as a fundamental principle of the nation's regulatory system for railroads for nearly a century.

Accordingly, PPG strongly urges the Board to deny UP's Petition.

I. IDENTITY AND INTEREST OF PPG

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass with over 15,400 employees in the United States and more than 50 manufacturing sites across the country. PPG also operates in more than 60 countries around the globe. Total sales in 2008 exceeded \$15 billion. Almost half of these sales are in the U.S.

PPG's commodity chemicals segment produces chlor-alkali and derivatives including chlorine, caustic soda, vinyl chloride monomer, chlorinated solvents, hydrochloric acid, calcium hypochlorite, and other chemicals. Most of these products are sold directly to manufacturing companies in the chemical processing, plastics and rubber, paper, minerals, metals, and water treatment industries. Price, availability, product quality and customer service are the key competitive factors in these businesses. PPG's North American chlor-alkali chemicals business operates three production facilities and employed over 1950 persons in 2008.

of the dispute between UP and U.S. Magnesium but notes that UP's statements regarding the "ample supply of chlorine" available closer to the destination and that such nearby sources constitute "much better alternatives" are contradicted by the Comments filed by U.S. Magnesium and the Chlorine Institute

Cost pressures have made it exceedingly difficult for PPG's businesses, including commodity chemicals to compete in a global industry and to maintain jobs in the United States. The commodity chemicals sector of PPG's business has faced tremendous cost pressures PPG's chemical rail bill alone has risen by 75% over the past 4 years.

Many of PPG's businesses are dependent upon reliable rail service. PPG believes an efficient and reliable rail industry is absolutely essential to a healthy and competitive U.S. economy and critical to PPG's success. PPG requires efficient rail transportation, as some products are not moved by other modes and many of PPG's customers cannot receive products via alternative modes. In North America, PPG only uses rail to ship its chlorine over land; PPG does not ship via truck. In that regard, PPG ships chlorine approximately 25% to 30% by rail and ships the remainder of the chlorine through pipelines or barges.

II. BACKGROUND

The common carrier obligation is a fundamental principle of the regulatory regime applicable to freight railroads. The Board recently held public hearings and solicited comments from the railroads and shipping public on the scope of the common carrier obligation, including its application to hazardous materials. *See* Ex Parte No. 677 (Sub No. 1), *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*. PPG filed written testimony with the Board and appeared at the hearing in July 2008.

To the extent that UP asks the Board to issue in this proceeding a broad policy or guidelines restricting the common carrier obligation as applied to TIH shipments, the railroad raises issues already debated and still pending before the Board in the Ex Parte No. 677 proceeding. UP participated in the Ex Parte 677 proceedings and is thus aware that, to date, no action has been taken by the Board which would justify UP's refusal to quote tariff rates for a

long haul TIH shipment based on safety risks. Further, despite the substantial overlap of the issues involved here and in Ex Parte 677, UP improperly ignores the extensive record established in the prior STB proceedings.

Furthermore, PPG believes that it would be highly inappropriate for the Board to adopt in the context of the narrow facts in this proceeding, a broad policy statement restricting the common carrier obligation for all TIH shipments. Whether a shipper's request for a long haul TIH movement constitutes a reasonable request for service under 49 U.S.C. § 11101 are to be determined on a case-by-case basis. *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir 2005). Thus, the Board should not "clarify" the common carrier obligation for *all* long haul TIH movements based solely on the limited facts involved in this declaratory order proceeding.

III. A GRANT OF UP's PETITION WOULD DISRUPT THE COMPETITIVE MARKET FOR CHLORINE AND HAVE IMPLICATIONS FAR BEYOND SAFETY

If the Board allows the UP (or any other railroad) to refuse to quote tariff rates (and thus refuse to provide rail service) whenever an alternative origin for chlorine exists closer to the destination, it would in effect transfer control over the sourcing of chlorine from the actual producers and users of the commodity to the railroads. PPG is concerned that vesting railroads with the arbitrary right to source chlorine based on "miles transported" would completely disrupt the competitive market for this commodity, as the railroads would be empowered to decide the winners and losers in particular markets. The anticompetitive impacts of the relief requested by UP invoke matters far beyond the expertise and jurisdiction of the Board.

UP wrongly assumes that chlorine is homogenous and interchangeable from one producer to the next in all cases. However, differences in the manufacturing process or treatment of chlorine post-production can exist, resulting in different commodity specifications required by

certain users. UP simply lacks the knowledge and expertise to determine whether the alternative sources of chlorine would meet the business requirements of the end user. UP's Petition demonstrates such lack of knowledge based on the assertion that the alternative sources involved in the dispute provide an "ample supply" of chlorine (Petition pp. 1-2) and are "much better alternatives." Petition p. 4. However, these statements have since been contradicted by the shipper involved in the dispute and by the Chlorine Institute ("CI"). See US Magnesium Comments p. 10; CI Reply at 3-4.

The railroad also has failed to consider other far-reaching impacts of its requested relief, including the risk of interference with existing contractual relationships between producers and their customers. Such a risk could result in the possibility of a producer not being able to fulfill its contractual obligations and thereby breaching contracts with its customers. In that regard, PPG is concerned that allowing the railroad to dictate the sourcing for chlorine could disrupt many different arrangements that PPG has with its customers. For example, PPG has a contract manufacturing arrangement with a customer whereby PPG ships chlorine to the customer and the customer uses the chlorine to manufacture titanium dioxide ("TiO2"). The TiO2 is then purchased by PPG and used in the manufacture of PPG's coatings. If the railroads are empowered to control the sourcing of chlorine, this efficient and cost-effective arrangement would be jeopardized unnecessarily.

To allow rail miles to serve as the sole or primary factor for chlorine substitutions is an over-simplistic approach that ignores the commercial complexities involved in such matters. In the past, the Board has wisely refused to delve into complex matters that have a heavy emphasis on non-transportation concerns. See *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937, 947 (1998) (product and geographic competition "have

required us to address complex non-transportation issues...requir[ing] us to 'second-guess' shipper management...[and]...dive deeply into industrial operations that are far removed from the transportation industries that we regulate."²

Moreover, UP's objectives to reduce long haul TIH movements and to avoid transporting TIHs in High Threat Urban Areas ("HTUA") are not always aligned. In a number of cases, avoiding HTUAs would require the rerouting of TIH shipments over longer distances with multiple interchanges, a circumstance both TIH shippers and the railroads desire to avoid. Accordingly, the Board should deny UP's Petition.

IV. THE BOARD LACKS PRIMARY JURISDICTION OVER THE SAFETY CONCERNS SET FORTH IN UP'S PETITION

In its Petition, UP asserts that safety and security risks associated with long haul shipments of chlorine justify the carrier's refusal to quote tariff rates for the movements in violation of its common carrier obligation.³ Specifically, UP believes that it should be permitted to avoid its statutory duty whenever the *railroad* decides that alternative chlorine sources closer to the destination should be used, in order to reduce the risks of a potential incident. However, UP's safety concerns are not matters that the Board can directly or independently fix. Rather, other federal agencies, such as the Federal Railroad Administration ("FRA") and the

² See also, *Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. 492, 493 (2001), *aff'd by Association of American Railroads v. STB*, 306 F. 2d 1108 (D.C. Cir. 2002)

³ Unlike the common carrier duty in 49 U.S.C. § 11101(a) to provide service "on reasonable request" there is no qualification to the duty to publish rates. *Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989, slip op. at 8 (served May 15, 2003) ("[i]t is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request."). Furthermore, the statute is clear that the only means by which a railroad may avoid its duty to quote a tariff rate to a shipper is to seek an exemption from the requirement under 49 U.S.C. § 10502(a) UP has not sought or been granted such an exemption. Thus, its refusal to quote tariff rates is a direct violation of its statutory duty.

Transportation Security Administration ("TSA") have primary jurisdiction over rail safety and security, respectively.⁴

Indeed, UP's cryptic statement in its Petition that "other government agencies, however, have pressed us to find ways to reduce TIH transportation risks" is an apparent reference to the Section 333 Conference initiated by FRA in 2007, with an objective of exploring means for reducing long haul shipments of TIHs. However, due to antitrust concerns, that proceeding concluded without the adoption of any specific agreements between the involved representatives of TIH shippers and the railroads. UP now seeks to avoid compliance with its common carrier obligation to address the same issue. However, the Board should not permit UP to circumvent the jurisdictional boundaries established by Congress to achieve indirectly that which was not achieved directly in the Section 333 Conference.

Moreover, the Board fulfills its responsibility with respect to safety questions when it determines that all Department of Transportation ("DOT") requirements have been satisfied. *See Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458, 463-44 (1977) ("*MKT*"); *Delta Air Lines, Inc v. C.A.B.*, 543 F. 2d 247, 260 (D.C. Cir. 1976) ("*CAB*"). In general, the Board should defer to its sister agencies' positions on safety and security as establishing both an inner and outer limit on its jurisdiction over the same matters. *CAB* at 260. These principles are strongest when there is a need for extensive technical expertise in determining safety standards and a need for uniform standards. *MKT* at 464. Because UP's Petition is not necessary to satisfy any DOT or TSA safety or security requirement, there is no basis for the Board to act.

⁴ See 49 U.S.C. § 103 and 49 C.F.R. Part 209, Appendix A, *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws*, para. 1 (summarizing FRA's authority over rail safety) and 71 Fed. Reg. 76852, 76855 (Dec. 21, 2006) (summarizing TSA's authority to regulate rail security).

Furthermore “a carrier may not ask the [Board] to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT...regulations governing such transport, and these regulations have been met.” *Akron, Canton & Youngstown R R Co v ICC*, 611 F. 2d 1162, 1169 (6th Cir. 1979) (“*Akron*”). See also, *U S Dept of Energy v The B&O R.R. Co.*, 364 I.C.C. 951, 959 (1981) (“*DOE*”) (a railroad may not “renege on its common carrier commitment” by claiming a commodity is too dangerous to handle when minimum safety requirements are satisfied); *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70, 73 (1978). Because UP’s Petition would abolish the common carrier obligation to transport a TIH commodity from a more distant origin when there is an alternate TIH source closer to the destination, it amounts to a claim that TIH movements in those circumstances are too dangerous to haul.⁵ But, UP has not alleged that it cannot transport TIH commodities in compliance with DOT or TSA regulations from the origin located farther from the destination. Thus, UP’s Petition does not raise any matter that is within the Board’s jurisdiction to address.

Also, where DOT and TSA have established complete and comprehensive safety and security standards for TIH transportation that balance the cost of safety and security with the need for economy, there is a heavy presumption that additional safety and security measures are unreasonable. See *Consolidated Rail Corp. v ICC*, 646 F. 2d 642, 650 (D.C. Cir. 1981) (“*Conrail*”).⁶ Absent any evidence by UP that existing DOT and TSA regulations are unsatisfactory or inadequate, the Board must consider those regulations to embody the

⁵ See e.g. *Classification Ratings of Chemicals, Conrail*, 3 I.C.C. 2d 331, 337 (1986) (characterizing Conrail’s insistence upon special train service for radioactive materials as a contention that the commodity is too dangerous to haul under any other circumstances).

⁶ In *Akron*, the Sixth Circuit affirmed the ICC’s determination that a railroad may seek approval of stricter safety standards than those imposed by DOT, if shown to be just and reasonable. 611 F.2d at 1169. However, whether or not a stricter safety standard is reasonable is a matter “properly to be explored *after* the publication of tariffs . . . not in deciding whether such publication should be ordered.” *Id.* at 1170 (emphasis added).

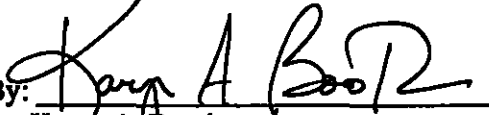
appropriate balance between safety and security considerations and the public need for the transportation of TIH commodities. *Id.* at 651-52.

V. CONCLUSION

For the foregoing reasons, PPG strongly urges the Board to reject UP's Petition and to avoid issuing any policy statement or guidelines that would improperly narrow the scope of the common carrier obligation for long haul TIH shipments and would interfere with the competitive market for TIH commodities.

Respectfully submitted,

PPG INDUSTRIES INC.

By: 

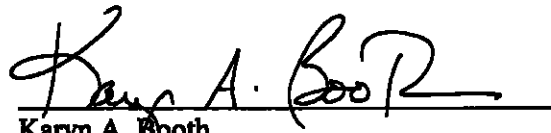
Karyn A. Booth
THOMPSON HINE LLP
1920 N Street, N.W.
Washington, DC 20036
(202) 263-4108
karyn.booth@thompsonhine.com

Counsel for PPG Industries, Inc.

Dated: April 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 10th day of April, 2009, a copy of the foregoing
Comments by first-class mail on all parties of record in this proceeding.


Karyn A. Booth